No. 97-1909

In the Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC., PETITIONER

v.

MICHETTI PIPE STRINGING, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether there has been "receipt by the defendant" of a copy of a complaint—and the 30-day time limit for removal of the action has therefore commenced under 28 U.S.C. 1446(b)—when proper service has not been made on the persons authorized by law to receive service of process for the defendant.

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INTEREST OF THE UNITED STATES

This case presents the question whether there has been "receipt by the defendant" of a copy of the complaint—and the 30-day time limit for removal of the action has therefore commenced under 28 U.S.C. 1446(b)—when proper service has not been made on the persons authorized by law to receive service of process for the defendant. The United States operates on a scale far greater, and with an organizational structure far more complex, than any ordinary corporate litigant. The United States and its agencies and officers are, moreover, frequently named as defendants in lawsuits filed in state courts throughout the country. The proper interpretation of the removal provision in

28 U.S.C. 1446(b) therefore has a significant impact on the litigation of the United States. In particular, the "receipt" rule adopted by the court of appeals in this case—which eliminates any requirement of proper service before the time for removal commences to run—threatens to foreclose the statutory right of the United States to remove cases to federal court even before those cases have been validly commenced against it in state court.

STATEMENT

1. On January 26, 1996, respondent Michetti Pipe Stringing, Inc., filed a complaint in Alabama state court seeking damages for an alleged breach of contract and fraud by petitioner Murphy Bros., Inc. Without making service as required by local law, respondent faxed a "courtesy copy" of the file-stamped complaint to a vice president of petitioner (Pet. App. A2; Pet. 2). A cover letter advised petitioner that respondent desired to continue settlement discussions so that the matter could be resolved "without continuing the litigation" (Pet. 2). Settlement discussions thereafter continued until February 12, 1996, when service of process was perfected under local law by certified mail (Pet. 2).

On March 13, 1996, petitioner removed this case to federal district court under 28 U.S.C. 1441. Respondent asserted that the removal petition was untimely under 28 U.S.C. 1446(b) because it was not filed within 30 days of the date on which petitioner's vice president received a faxed copy of the complaint. The district court concluded, however, that the 30-day period for removal under 28 U.S.C. 1446(b) did not begin to run until the date that petitioner received lawful service of the complaint (Pet. App. A10). Noting that the statute provides for removal within 30 days of the date that the

defendant receives the complaint "by service or otherwise," the court held that the "or otherwise" language refers to the particular practice of the few States in which an action may be begun by service of a summons *without* the requirement of any initial pleading or complaint. The court concluded that the "or otherwise" language has no application to state court practice in Alabama, where an action is commenced with the filing of a complaint and with the service of the summons and complaint upon the defendant (*ibid.*).

2. On a certified interlocutory appeal, the court of appeals reversed (Pet. App. A1-A6). The court held that, even in the absence of lawful service of process, "the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading" (*id.* at A1). The court reasoned that the plain meaning of the phrase "'through service *or otherwise*' opens a universe of means besides service for putting the defendant in possession of the complaint" (*id.* at A3) (emphasis added).

The court of appeals rejected the argument that "this plain meaning contravenes the congressional intent reflected in the legislative history" (Pet. App. A4). The court acknowledged that the "or otherwise" language had been added to the removal statute in 1949 to address the problem of States such as New York, "where service of process could precede filing and service of the complaint" (*ibid.*). The court reasoned that affording the language of the statute its plain meaning did not conflict with this legislative purpose, for there was nothing to indicate that Congress intended to limit application of the amendment "to New York and like states" (*id.* at A5). The court stated that "[t]he indication is in fact to the contrary," because it appears that

Congress sought to place defendants in all States on the same footing (*ibid.*).

With respect to the possibility that "a receipt rule invites abuse" by counsel who would "set 'courtesy copy traps' for unwary defendants," the court stated that "[t]he short answer is that no such abuse has occurred here" (Pet. App. A6). The court stated that "[t]he question of discouraging unjust tactics can thus be safely set 'aside for consideration on a rainy day'" (*ibid.*, quoting *Roe* v. *O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The 30-day period for removal of cases to federal court under 28 U.S.C. 1446(b) commences only after the "defendant" has received a copy of the complaint. A party is made a "defendant" to a lawsuit only through lawful service, not by sending a copy of a complaint through a fax machine or by some other unauthorized means. Neither the text nor the history of the removal statute supports the conclusion reached by the court of appeals in this case that Congress intended, in the 1949 amendment to 28 U.S.C. 1446(b), to require a party to remove a case even though lawful service of process has not been made.

Prior to enactment of the 1949 amendment, the statutory removal period expressly began to run on the date that service of process occurred. That pre-1949 provision created a problem under the laws of a few States that permitted a civil action to be commenced by service of a summons *without* an accompanying complaint. The 1949 amendment was expressly designed by Congress to resolve the problem that existed for the defendants in those States by specifying that the removal period would commence only after the complaint was

"recei[ved] by the defendant, through service or otherwise." 28 U.S.C. 1446(b). Nothing in the legislative history or in the text of the amendment suggests an intent to eliminate the universal requirement that the "defendant" first be brought into the case through compliance with applicable rules for valid service of process.

The language that Congress chose in 1949 to address the specific problem of separate delivery of the complaint and the summons under New York practice does not support an interpretation that would transform that amendment into an obstacle to the proper conduct of litigation by the United States. Congress has provided the United States with a broad right of removal for cases filed against it in state court. 28 U.S.C. 1442 (1994 & Supp. II 1996). Under the interpretation of 28 U.S.C. 1446(b) adopted by the court of appeals in this case, that broad right of removal could be defeated through the simple artifice of sending a "fax" or other unofficial copy of the complaint to any of a wide variety of federal officials, even though those officials are not authorized to receive service on behalf of the United States. In enacting the 1949 amendment, Congress did not intend to authorize that facile nullification of the removal right conferred on the United States.

ARGUMENT

I. THE INTERESTS OF THE UNITED STATES WOULD BE IMPAIRED BY AN INTERPRETATION OF 28 U.S.C. 1446(b) THAT DISPENSES WITH VALID SERVICE OF PROCESS AS A CONDITION OF COMMENCING THE TIME ALLOWED FOR REMOVAL

The interpretation of 28 U.S.C. 1446(b) adopted by the court of appeals threatens severe prejudice to the right of the United States to remove cases commenced against it in state courts. The United States is entitled to remove to federal district court any proceeding brought in state court against the United States or against "any agency thereof or any officer of the United States" who is sued "for any act under color of such office." 28 U.S.C. 1442(a)(1) (Supp. II 1996). See also 28 U.S.C. 1442(a)(3) (removal of suits against federal judicial officials); 28 U.S.C. 1442(a)(4) (removal of suits against federal legislative officials); 28 U.S.C. 1442a (removal of suits against members of armed forces); 28 U.S.C. 1444 (removal of foreclosure actions against the United States). It is not unusual for a relatively low-level federal official in a local field office to receive a copy of a pleading naming the United States as a defendant. This can occur for a variety of reasons: through a defective attempt by an unsophisticated litigant to make service on the United States; as a "courtesy" or "advance" copy of an unserved pleading; and even, perhaps, as a premeditated litigation tactic seeking to extinguish the removal right of the United States even *before* the case is validly commenced in state court by lawful service of process.

Due to the size and scope of the government's activities, this problem is greater for the United States than

it is for other litigants. Many federal officials, in all ranks of government, would be unlikely to attach any substantive significance to their receipt of a faxed or non-official copy of a state court pleading. Under the "receipt" rule articulated by the court of appeals, however, the statutory right of the United States to remove cases filed against it in state court could often expire long before the persons who have authority to act on behalf of the government are even made aware of the existence of the lawsuit. In establishing the procedure for the removal of cases under 28 U.S.C. 1446 (1994 & Supp. II 1996), it is exceedingly unlikely that Congress intended to allow such a simple nullification of the broad and comprehensive removal right that it conferred in related statutory provisions.

This conclusion draws additional support from the policies reflected in Rule 4(i) of the Federal Rules of Civil Procedure. That Rule, which sets forth prerequisites for service of process "[u]pon the United States, and Its Agencies, Corporations, or Officers," employs a "belt and suspenders" scheme of service to ensure that the proper decisionmaking officials of the federal government receive notice of any lawsuit in time to take appropriate action. Under the detailed guidelines of the Rule—which have been in place since the inception of the Federal Rules of Civil Procedure in 1938—the plaintiff must serve not only "the United States Attorney for the district in which the action is brought" (Fed. R. Civ. P. 4(i)(1)(A)) but must also serve the Attorney General (Fed. R. Civ. P. (4)(i)(1)(B)) and, when the validity of an order of a non-party officer or agency is involved, must also serve that officer or agency as well (Fed. R. Civ. P.(4)(i)(1)(C)). The policies reflected in this Federal Rule, and in analogous state rules governing the service of process, would be

seriously undermined by a construction of the removal statute that deprived the appropriate decisionmakers of a realistic opportunity to address the matter of removal.[1]

The courts that have adopted a "receipt" rule under 28 U.S.C. 1446(b) have not squarely confronted the question of *whose* receipt is sufficient to commence the running of the statute. In adopting the "receipt" rule in *Tech Hills II Associates* v. *Phoenix Mutual Insurance Co.*, 5 F.3d 963 (6th Cir. 1993), the court stated that,

[1] Only a few courts have addressed whether state service procedures are supplanted in cases against the United States by Rule 4(i) of the Federal Rules of Civil Procedure. For example, in *Wilson* v. *United States Department of Agriculture*, 584 F.2d 137, 140-141 (1978), the Sixth Circuit held that state rules of civil procedure control service for federal agencies in state court proceedings unless federal law expressly otherwise provides. State service rules, however, ordinarily result in sufficient service on the United States. The States sometimes choose to incorporate the federal standard of Rule 4(i) for service on the United States. See, *e.g.*, Md. R. Civ. P. 2-124(k) ; D.C. Super. Ct. R. 4(2)(c)(i). Other States require all suits against the state government to be served on the state attorney general (see, *e.g.*, Cal. Gov't Code § 955.4 (West 1995); Ky. R. Civ. P. 4.04(6); Mass. R. Civ. P. 4(d)(3); N.J. R. Ct. 4:4-4(a)(7); Ohio R. Civ. P. 42(10), Tex. Civ. Prac. & Rem. Code Ann. § 30.004 (West 1998); Wyo. R. Civ. P. 4(5); in cases involving the federal government in these States, the state courts ordinarily apply either the rule for service applicable to the state government or the requirements of Rule 4(i) itself. See *Lamb* v. *Village of Quincy*, 636 N.E. 2d 412, 417 (Ohio Ct. App. 1993), (requiring notice to "HCFA, the Secretary of HHS, or the United States Attorney General and the United States attorney"), cert. denied, 513 U.S. 930 (1994). Federal agencies that are authorized to sue and be sued in state courts have been empowered to specify by regulation that service on them be made under Rule 4(i). See *A.L.T. Corp.* v. *Small Business Admin.*, 801 F.2d 1451, 1457-1458 (5th Cir. 1986).

"[a]s a general rule, a complaint is considered received by a corporation when it is received by an agent authorized to accept service of process." *Id.* at 968 (citing *Pochiro* v. *Prudential Ins. Co.*, 827 F.2d 1246, 1279 (9th Cir. 1987)); 14A C. Wright, et al., *Federal Practice and Procedure* § 3732, at 284-285 (1997 Supp.). Without deciding whether there are any exceptions to this general rule, the court held that "delivery at defendant's place of business on a Saturday, when the offices are closed, to a security guard, who is not authorized to receive service on behalf of the corporation" would *not* be "receipt under the removal statute." 5 F.3d at 968. The court concluded in that case that the removal period was commenced, however, when the security guard transmitted the pleading to "an authorized representative" of the defendant on the following Monday. *Ibid.*

In *Reece* v. *Walmart Stores, Inc.*, 98 F.3d 839, 843 (5th Cir. 1996), the court expressly held that the removal period was triggered by receipt of a copy of the complaint by the CEO of a corporation even though the CEO was *not* authorized to accept service of process for the corporation. The court agreed "that a corporation is not deemed to have received a petition just because any one of its employees has received it." *Ibid.* The court reasoned, however, that the CEO was "a person whom [the plaintiff] reasonably could assume to be responsible and sufficiently familiar with legal matters to forward the pleading to the proper individual or department within the company." *Ibid.* The court concluded that "this method of delivery" was "a perfectly sensible way to notify a responsible individual within the corporation." *Id.* at 843-844.

It is thus unclear whether the courts that apply a "receipt" rule under this statute would regard delivery

to any of the thousands of various federal officials located at any of the hundreds of federal offices and agencies throughout the Nation as sufficient to constitute "receipt" by the United States. The broad standard suggested in *Reece* v. *Walmart*, 98 F.3d at 843, would seemingly require only that it "reasonably" appear to the *plaintiff* that the federal officer could be expected to "forward the pleading to the proper individual." A standard of such ambiguity and breadth could significantly prejudice the government's statutory right of removal. Indeed, any standard that fell short of requiring service on the individuals authorized by law to receive service of process would fail to ensure that the pleading is received by "the proper individual" who is responsible for protecting the rights of the United States.

If the "receipt" rule articulated by the court of appeals were the only reasonable interpretation of 28 U.S.C. 1446(b), any remedy for the difficulties thus created would necessarily lie with Congress. As we discuss below, however, neither the text nor the history of the statute supports the reasoning or conclusion of the court in this case.

II. THE LANGUAGE AND LEGISLATIVE HISTORY OF 28 U.S.C. 1446(b) REFLECT THAT VALID SERVICE OF PROCESS IS REQUIRED TO COMMENCE THE RUNNING OF THE TIME ALLOWED FOR REMOVAL

In 1949, Congress amended 28 U.S.C. 1446(b) to address a particular anomaly that had arisen under the statute from the variations that existed in the state procedures for commencing litigation. Before the statute was amended in 1949, the time for removal ran simply from the "service of process" on the defendant.

28 U.S.C. 1446(b) (1948). The Committee Note on the 1949 Amendments explained that:

> Subsection (b) of section 1446 of Title 28, U.S.C., as revised, has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.
>
> The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.
>
> This provision, however, without more, would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

16 *Moore's Federal Practice* § 107 App.02[2] (D. Coquillette et al. eds., 3d ed. 1998). For these specific reasons, Congress amended the statute to provide that the time for removal is to run from the "receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief" (28 U.S.C. 1446(b)). By adding the language "through service or otherwise," Congress sought to *accommodate* the diverse service rules of the various States. The amendment was not designed, and did not purport, to

eliminate the requirement that the service rules of the individual States be complied with as a prerequisite for commencing the time for removal. In particular, the amendment was not designed to create a trap for the unwary that would permit a defendant to lose the right of removal even before the action is validly commenced by service of process on the defendant in accordance with state procedures.[2]

The text of the statute makes this clear, for it applies only when "the defendant" receives the initial pleading. 28 U.S.C. 1446(b).[3] For the purposes of this statute, a party cannot be deemed "the defendant" in a case filed in state court until that case has been lawfully commenced either (i) by service, under the ordinary rule, of the summons and complaint or (ii) by service, under the New York and Kentucky rules, of the summons without the complaint. See Committee Note on the 1949 Amendments, *supra*; note 3, *supra*.

A related provision of the removal statutes confirms this understanding. In cases in which diversity is the grounds for removal, 28 U.S.C. 1441(b) provides that the "action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the State in which such action is brought" (emphasis added).[4] Congress plainly understood that a "defendant" must be "properly joined and served" in the case for removal to occur.

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[2] In *Roe* v. *O'Donohue*, 38 F.3d at 303, the court noted that the "cases that would put this language under stress (and hold it up to a charge of absurdity) are not hard to imagine: consider, for example, what happens if the plaintiff sends the defendant a courtesy copy of the complaint before filing, and thus before removal is possible." *Ibid.* In the present case, the court of appeals stated that this particular misapplication of the statute could not occur because, "until it is filed, a draft complaint is not the 'initial pleading setting forth the claim for relief upon which such action . . . is based' that the defendant must receive to start the thirty-day clock" (Pet. App. A6). Of course, it is not possible for a defendant to be certain, in the absence of file-stamping or an attached summons, whether or not a copy of a complaint received (for example) by fax has been filed. It is thus plainly possible, under the decision of the court of appeals, for defendants to lose their removal rights before they even become aware that the lawsuit has been commenced.

[3] A different rule applies for the States described in the 1949 legislative history, such as Kentucky (see pages 4-5, *supra*), that require the complaint to be filed at the time the summons is issued but do not require the complaint to be served along with the summons on the defendant. In those States, the 1949 amendment provides for the time for removal to expire "thirty days after the service of summons upon the defendant" (28 U.S.C. 1446(b)).

[4] As petitioner notes (Pet. 13), Rule 81(c) of the Federal Rules of Civil Procedure, which provides a 20-day time limit within which to respond to a complaint after removal, was adopted contemporaneously with and in response to the 1949 amendment. That Rule contains language identical to the "or otherwise" language in the removal statute. In *Silva* v. *City of Madison*, 69 F.3d 1368 (7th Cir. 1995), cert. denied, 517 U.S. 1121 (1996), the court properly construed this identical language to require service of the complaint as the event that triggers the 20-day period. In so holding, however, the court sought to distinguish its prior decision in *Roe* v. *O'Donohue*, *supra*, in which, without considering the language of Rule 81(c), the court held that Section 1446(b) imposes a "receipt" rule on the removal period. See 69 F.3d at 1376. The court did not adequately explain why one who has not yet lawfully been made a party to an action should be required to decide in which court system the case should be heard. The court stated only that "[i]t is one thing to require removal before proper service is effected; it is quite another to require a party to file a responsive pleading." *Ibid.* We disagree. In both of these contexts, proper notice of the litigation to the persons who are lawfully designated to receive process is equally necessary so that the rights of the defendant may be fully and fairly protected.

It would be anomalous if any of the time limits that govern a defendant's possible responses to the initiation of a lawsuit—such as removal—would begin to run *before* that party actually became a defendant through the lawful commencement of the suit by valid service of process. Lawful service upon the party named as the defendant in the complaint is a prerequisite to the ordinary exercise of judicial authority and to the due process of law. Absent a statutory text and history that clearly compel a different rule in this specific context, it should be assumed that Congress did not intend to alter these established principles in the 1949 amendment of this statute.

Instead, as both the text and history of the 1949 amendment reflect, for the removal time to begin running, the suit must be validly commenced by lawful service of process against the "defendant." To give account to the rules of those States in which an action may be commenced merely by serving the summons and without providing a copy of the complaint, the statute provides that the "defendant" must have received a copy of the complaint *by some means*—whether by "service or otherwise." 28 U.S.C. 1446(b); see also note 3, *supra*. When, under the ordinary state practice, applicable law requires service of *both* the summons *and* the complaint to bring the "defendant" into the case, the 30-day removal period commences to run only upon the perfection of such service.[5]

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[5] In *Reece* v. *Walmart Stores, Inc.*, 98 F.3d at 841 n.3, the court failed to address the requirement that there be a "defendant" before the time for removal can begin to run. The court reasoned instead that the statutory text reveals that "the time to remove begins upon receipt of a copy of the initial pleading *through any means*" and therefore concluded that the statute "plainly contemplates that the time to remove might begin prior to service." *Ibid.* The court stated that this "plain language of § 1446(b) does not produce thereby an *absurd* result; instead, it reflects a legislative policy judgment that the receipt rule's benefits outweigh its detriments." *Id.* at 842 Nothing in the history of the 1949 amendments, however, provides any basis for attributing any such "policy judgment" to Congress.

In the present case, applicable state law requires service of the summons and complaint to bring the party served within the jurisdiction of the court as a "defendant" (Pet. App. A10, citing Ala. R. Civ. P. 4). Petitioner thus did not become a "defendant" for purposes of 28 U.S.C. 1446(b) until it received lawful service of process. The faxed copy of the complaint did not lawfully bring petitioner into this action as a "defendant" and did not commence the 30-day period under the removal statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys

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